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# Elephants in the Room: The European Commission's 2019 Communication on the Rule of Law

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## Abstract

This contribution honouring Prof. Martin Krygier scholarship provides a brief critical reading of the European Commission's July 2019 Communication on the Rule of Law (COM(2019) 343 final). It argues that although the Commission's effort is welcome, the Communication fails to correctly identify the core problem related to the Rule of Law in the EU, which is the constitutional capture in the illiberal regimes. The failure to identify the core problem with unequivocal precision and spell out its key elements as well as dissect its causes undermines the likely effectiveness of the tools proposed by the Commission to address the unnamed and unanalyzed ongoing Rule of Law concerns. Consequently, the Communication is lacking in vital essentials, if not vacant at the core.

The first aim of this brief contribution is to record the admiration and respect vis-à-vis a beloved CEU Professor and an inspiring colleague for his overwhelming contribution to the study and teaching of the Rule of Law worldwide. To flag persisting Rule of Law problems in the EU, this short note is thus to accompany a parcel with a Leonard Paris Tie (Dessin No. 68755, with signal flags on golden cords—I hope that you do not yet have such, Martin!)<sup>1</sup> and a more conventional, non-academic 'Thank You' note. From the classes in Budapest to conferences all over the world, from Cambridge to Princeton and New York, Professor Krygier's modest towering presence is always humbling, friendly and inspiring. I am doubly grateful: besides groundbreaking work on the Rule of Law guiding numerous scholars in their understanding of the complex concept, he also managed to explain parts of the great Professor

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<sup>1</sup> Which another notable tie-loving professor had, to which the exposition at Palazzo Pitti testified: Monni (2012).

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Palombella's œuvre<sup>2</sup> (a task which many would find impossible) to the non-adept public with grace, simplicity and precision,<sup>3</sup> which resulted in attempts to apply the insights of both scholars to the current reality in the EU.<sup>4</sup> I am hugely grateful for all of this, dear Professor Krygier. Your work stands out in the Rule of Law scholarship landscape akin to what Daniel Tribouillard required of his chef-d'œuvres of silk printing: it is simple, unique, and all-encompassing: 'une fleur posée sur soie'.<sup>5</sup>

The second aim of this brief contribution is to provide a critical assessment of the Commission's July 2019 Communication on the Rule of Law,<sup>6</sup> which is interesting in two senses. Firstly, it appears at a time when the Union is embroiled in the worst Rule of Law crisis since its inception<sup>7</sup> following the authoritarian turn in two Member States and the ample demonstration by all the institutions of the Union of the lack of political will to deal with the ongoing crisis,<sup>8</sup> notwithstanding the activation of Article 7(1) TEU in reaction to the abuses that are still taking place in two Member States—a misuse of an inapplicable legal basis for action, no doubt, given the state of affairs.<sup>9</sup> Only the Court of Justice seems to be faithful to the EU Rule of Law promise in Article 2 TEU,<sup>10</sup> having reinvented Article 19 TEU for the purpose of standing up to the dismantling of judicial independence, one of the core constitutional basic principles on which the Union is founded.<sup>11</sup> The Commission was thus long overdue in saying something meaningful on this matter of core constitutional importance—following its quite dubious 'Pre-Article 7 Procedure' from 2014,<sup>12</sup> which has neither been consistently applied, nor has it brought any fruit whatsoever: exactly as predicted in the literature.<sup>13</sup> In July 2019 the Commission finally told us what it thinks should be done—and accordingly, given, once again, the dramatic context of the constitutional decline in at least two Member States, the Commission's Communication is of crucial importance.

<sup>2</sup> E.g. Palombella (2010); Palombella (2009), p. 17. Cf., in direct engagement with Krygier, Palombella (2019).

<sup>3</sup> Krygier (2014).

<sup>4</sup> Kochenov (2015).

<sup>5</sup> Tribouillard and Privat Savigny (2006).

<sup>6</sup> European Commission, 'Strengthening the Rule of Law within the European Union: A Blueprint for Action. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions', COM(2019) 343 final.

<sup>7</sup> Sadurski (2019); Pech and Scheppele (2017).

<sup>8</sup> Kochenov et al. (2016); Sente (2017).

<sup>9</sup> Besselink (2017); Bugarič (2016). Cf., for a purely 'black letter' treatment: Kochenov (2019a).

<sup>10</sup> Klamert and Kochenov (2019). Specifically on the EU Rule of Law, see, most importantly, Pech (2009, 2016); Platon 2019. On the rebranding of the principle of the Rule of Law as a 'value' during the Lisbon revision of the Treaties, see, Pech (2010).

<sup>11</sup> CMLRev Editorial Comment (2019); Kochenov and Bárd (2019). Martin Krygier provides an excellent discussion of the relationship between constitutionalism and the Rule of Law: Krygier (2017).

<sup>12</sup> European Commission, 'A New EU Framework to Strengthen the Rule of Law', Strasbourg, 11 March 2014, COM(2014) 158 final. Cf. Kochenov and Pech (2015, 2016).

<sup>13</sup> Kochenov et al. (2015).

Ironically, the Commission is (tactically?) silent about the core of the problem at hand, thus offering the second point of departure in reading the Communication: it is crucial what the Commission *does not say*. It does not expressly say a single word about the constitutional capture in several Member States,<sup>14</sup> which are being turned into de facto one-party regimes without an independent judiciary that meets the requirements of Article 19 TEU and, of course, without serious adherence to the core principles and values on which the Union is founded, thus exemplifying Kim Scheppele's concept of 'autocratic legalism'.<sup>15</sup> Equally, the Commission says nothing about the mutual learning<sup>16</sup> between the captured states to perfect the undoing of rights and freedoms of Europeans, which the Union has promised to protect, including during the last three rounds of enlargement.<sup>17</sup> Martin Krygier's wonderful Rule of Law 'abuser's guide'<sup>18</sup> put into practice, most regrettably, by the Hungarian and Polish governments mired in an abuse of power, goes unnoticed and unchecked—at least on the surface that is. Assuming for a moment that the reader is aware of the context of constitutional capture in Hungary and Poland—a set of developments which has been richly documented<sup>19</sup>—this contribution will focus mostly on what the Commission tells Europeans and EU institutions and what it does not.

Following the Rule of Law consultation in April 2019, on 17 July 2019—in the interregnum—the European Commission published its Communication summarising this institution's main ideas aimed at strengthening the rule of law within the Union. The key innovations are twofold. Firstly, it is the introduction of the regular Rule of Law reporting cycle, which is also in line with what the European Parliament has long argued for.<sup>20</sup> Secondly, it is paying more attention to the financial strings at the Union's disposal to guarantee that the Rule of Law and other core values are complied with: corruption and the destruction of democratic institutions and independent courts should not continue being rewarded with taxpayers' money from other Member States as has been the case up until now.

What the Commission proposed is in line, in large part, with what has been argued by the leading scholars engaged with the problem at hand all along and summarised in a Policy Brief, submitted to the Commission as part of the consultation by Laurent Pech and myself, outlining with clarity the prevailing assessments of the current situation and the Commission's role played therein across the relevant literature: proof that good ideas are in the air, as it were.<sup>21</sup> While it is in line with the thoughts expressed in our Policy Brief, the Commission's contribution seems to be punching way below the weight of that institution in terms of supplying a clear and realistic assessment of what the EU is dealing with today: the reasons behind

<sup>14</sup> Pech and Scheppele (2017); Scheppele (2017).

<sup>15</sup> Scheppele (2018). Cf. Sajó (2019).

<sup>16</sup> Pech and Scheppele (2017).

<sup>17</sup> Sadurski (2012); Kochenov (2008).

<sup>18</sup> Krygier (2006).

<sup>19</sup> E.g. Sadurski (2019); Blay-Grabarczyk (2019); Magyar (2016); Sente (2017); Sólyom (2015); Scheppele (2015).

<sup>20</sup> Cf. Bárd et al. (2016).

<sup>21</sup> Pech and Kochenov (2019).

the Communication in the first place. There is little room for jubilation, in fact: the Communication's weakest point is the Commission's inability to call a spade a spade—akin to the unhelpful views expressed in President-elect von der Leyen's first interviews, who opined, in the context of the crises in Poland and Hungary that 'nobody's perfect'<sup>22</sup>—the Communication fails to take the problem—a deeply exceptional depth of the constitutional capture in two Member States—seriously enough to place it at the centre of its resulting hugely befogged analysis. By failing to mention, let alone explain, what the *actual* core problems with the Rule of Law that the EU is facing are—and to engage sufficiently with the idea of constitutional capture, which does not feature in the Communication at all—the Commission has consequently left the most fundamental Rule of Law problems out of the picture, effectively disconnecting the Rule of Law Communication from the essence of the ongoing fight for the Rule of Law on the ground in the abusive Member States. It is the idea that some Member States would proactively seek to undermine the Rule of Law in order to create de facto one-party regimes where democracy is paralysed and the Rule of Law is hollowed that is missing from the Communication. It is thus precisely the Rule of Law—ironically, but also sadly—which is the elephant in the room.

## 1 What the Commission Wants to Do

The Commission's optimistically-titled Communication on 'Strengthening the Rule of Law within the Union: A Blueprint for Action' sets a number of commitments that the Commission intends to honour and also formulates recommendations addressed to other EU institutions, Member States and non-governmental actors. According to the Commission, it sets out concrete actions for the short and medium term aiming to resolve the outstanding rule of law issues.<sup>23</sup> In a somewhat lengthy introduction that does not explain the nature of Rule of Law backsliding in troubled Member States (Hungary and Poland, the only targets of Article 7 TEU activation in the EU's history—however unhelpful<sup>24</sup>—are never mentioned, just as the fact of Article 7 TEU being deployed) the Commission restates all the mantras of an 'EU based on values', which the problematic Member States are very familiar with since these were part of the pre-accession conditionality exercise conducted by the Commission earlier in this millennium, the failure of which resulted in the ongoing Rule of Law crisis<sup>25</sup>—the one which the Communication's silence tries to tackle.<sup>26</sup> Importantly, the Commission is entirely silent also on any other causes of the problems both on

<sup>22</sup> Rettmann (2019).

<sup>23</sup> European Commission, 'Strengthening the Rule of Law within the European Union: A Blueprint for Action. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions', COM(2019) 343 final, p. 2.

<sup>24</sup> Kochenov (2019b).

<sup>25</sup> Kochenov (2008).

<sup>26</sup> Cf. Halmai (2019).

the ground—in the Member States—and at the EU level, thus not addressing not only the Member State-level principled ignorance of the principles which caused the crisis at hand, but also the EU's weak and incapable reaction to the Rule of Law problems that arose as a result. Scholars have been clear on what the key causes of the latter are: the lack of a clear will by the Member States and the inability of the EU institutions to utilize the full potential of the available legal instruments available to match the gravity of the problem. The Commission has nothing in stock in its new Communication to address the core causes of the current Rule of Law problems it purports to be dealing with. This concerns not only the level of action (Member States opposed to the EU itself in the complex multi-level Rule of Law setting seriously affecting the workability of the possible solutions<sup>27</sup>) but also the nature of the action available—from the focus on enforcement,<sup>28</sup> criticized in the literature for the obvious lack of sociological legitimacy,<sup>29</sup> to the option of deeper EU reform.<sup>30</sup> Without outlining the causes, it is difficult, of course, to expect effective solutions, even in a highly political world, like Brussels.

Once we move on from what is *not* in the Communication, the text per se is respectable: the Commission attempts to make a strong case for being serious about the Rule of Law<sup>31</sup> citing both citizens' concerns flowing very clearly from the latest Eurobarometer surveys and also welcoming the new significant steps by the Court of Justice of the EU in the direction of fine-tuning the values of Article 2 TEU to turn them into practically applicable principles in the context of EU law: the process emerging with particular clarity in the context of the reinterpretation of the scope of Article 19 TEU, which has truly far-reaching implications in the current context. The Communication follows the structure offered in the consultation document published by the Commission in April 2019 and analyses the possible actions in three areas: promotion, prevention and enforcement.

## 1.1 Promotion

The aspect of the *promotion* of the Rule of Law has two dimensions in the Communication. The first one concentrates on the role of civil society and the need to support it by new programmes (e.g. Rights and Values programme and Creative Europe programme). In this context the Commission mentions an 'yearly event on rule of law' for dialogue with civil society as well as a new communication strategy. All the right buzz words are mentioned, including cooperation with academia and civil society, a renewed role for the Rule of Law in education and the like. The Commission wants everyone to speak with everyone about the Rule of Law, including national parliaments, international organizations and institutions. This is where the puzzling lack of clarity about the nature of the problem the Commission is aiming to address,

<sup>27</sup> Palombella (2016).

<sup>28</sup> Scheppele (2016). Cf., in general, Jakab and Kochenov (2017a).

<sup>29</sup> Weiler (2016); Blokker (2016, 2018, 2019).

<sup>30</sup> Bugarič (2016).

<sup>31</sup> This case has been made by academia, *inter alia*, by Closa (2016).

as well as the causes of this non-disclosed problem to which the Commission's 17 dense pages are dedicated, is starting to bite: if some elections, although free, are not fair,<sup>32</sup> how much 'Rule of Law learning' can we expect from the dialogues between the unfairly elected 'parliaments' in the captured Member States and real parliaments? What can those who are engaged in constitutional capture learn from academia, when whole academies are dismantled (like the Hungarian Academy) and the best University in the whole of Central and Eastern Europe has been driven out from Hungary (like CEU)?<sup>33</sup> What can we learn from the NGOs if captured Member States cut their funding streams and harass those who still dare to criticise the politicians in power?<sup>34</sup> The Communication even calls on the European Parliament and national parliaments to develop specific inter-parliamentary cooperation on Rule of Law issues, to which the Commission could contribute. Not mentioning constitutional capture, besides diluting the message, thus allows the Commission to come up with deeply questionable and entirely misplaced recommendations, which look good enough on paper to be welcomed solely by those who have zero knowledge of the core issues at stake. The Commission seems to be willing to send a message of friendly ignorance, which could unfortunately be dangerous, given the high stakes involved.

The second dimension of the promotion of the Rule of Law advocated by the Commission in its 2019 Communication deals with the relationship between the European Union and the Council of Europe and its institutions (the Venice Commission and GRECO) which was famously torpedoed by the Court of Justice in its Opinion 2/13<sup>35</sup> bid for the purification of the absolute autonomy of the legal order<sup>36</sup> of which it is the custodian, using the Rule of Law as a shield against the introduction of the high standards of human rights protection in the EU,<sup>37</sup> thus exacerbating eventual justice deficit problems<sup>38</sup> with direct Rule of Law implications<sup>39</sup> and upholding the ongoing neo-mediaeval tendencies in the Union's equality law,<sup>40</sup> going down to the core of the functioning of the legal system,<sup>41</sup> which is turning, for one reason or another,<sup>42</sup> into a system functioning in the name of a narrow meaning of a Treaty text, rather than deploying justice principles.<sup>43</sup> The Venice Commission and GRECO are all fine, but mentioning the revamping of the CoE accession process—notwithstanding the fact that the EU is obliged by the Treaties, of

<sup>32</sup> Walker and Boffey (2018).

<sup>33</sup> Redden (2018).

<sup>34</sup> Szuleka (2018).

<sup>35</sup> Opinion 2/13 *ECHR Accession II* [2014] ECLI:EU:C:2014:2454; Eeckhout (2015).

<sup>36</sup> And this is not to deny that autonomy is of crucial importance, of course; it is its limits that are naturally always contested: Lenaerts (2019).

<sup>37</sup> Kochenov (2015).

<sup>38</sup> Williams (2009); Roy (2015).

<sup>39</sup> Douglas-Scott (2015).

<sup>40</sup> O'Brien (2018); Kochenov (2016).

<sup>41</sup> de Búrca (1997), p. 14.

<sup>42</sup> Spaventa (2017); Nic Shuibhne (2017).

<sup>43</sup> Williams (2010).

course, to eventually accede—is both puzzling and somewhat, if not entirely, out of place. Whatever one thinks of the CoE—and the EU unquestionably has a lot to learn from that organisation also beyond the pre-accession context<sup>44</sup>—again, should the Commission formulate the constitutional capture problem clearly, there would be no need at all to spill the ink focusing on the unlikely developments that our self-minded Court does not welcome.<sup>45</sup> Indeed, in viewing itself, as a matter of principle, as unable to be constitutionally limited by the ECt.HR, the Court of Justice, although potentially pushing for ‘EU Law without the Rule of Law’<sup>46</sup> does not actually either create or solve any problem. The EU’s accession is *of no relevance* for the most burning issues facing Hungary and Poland today and the Commission could be expected to be clear on this: Rule of Law backsliding and the crisis it has caused has nothing to do with the EU’s accession to the ECHR.

Where the position of the Court of Justice is of huge relevance, however, is the revamped understanding of judicial independence in the EU legal context through the renewed interpretation of Article 19 TEU. And here the Commission is absolutely right to summarize the recent groundbreaking case law of the Court of Justice on the Rule of Law and judicial independence. One of the core causes of the problem that the Commission does not formulate is that, contrary to the apparent intention of the drafters, it has not been the Council, the Commission and the European Parliament acting in the context of Article 7 TEU, but the Court, armed with Article 19 TEU, that emerged as the most robust critical interlocutor of the autocrats in Poland and Hungary. This is unquestionably clear testimony of the failure of the EU institutions, which however is not surprising, given the confrontational nature of Article 7, which is opposed *par excellence* to the very interpenetrationist logic of the internal market.<sup>47</sup>

## 1.2 Prevention

The core element of *prevention* in the Commission’s Rule of Law Communication is the necessity ‘to facilitate cooperation and dialogue’<sup>48</sup>; the key paradigm is thus that of *compliant* Member States unwillingly sleepwalking into non-compliance with the values. This paradigm is flawed. The fact that it is not clear right away based on what the Commission presents is solely due to the failure of the institution to provide a clear and compelling analysis of the actual problems the EU and the Member States are facing in the area of the Rule of Law. What I described together with András Jakab elsewhere as the intuitive ‘spectrum of defiance’ could assist us in

<sup>44</sup> Cf. e.g. Kochenov (2006).

<sup>45</sup> But see Lindeboom (2018).

<sup>46</sup> Kochenov (2015).

<sup>47</sup> Kochenov (2019b).

<sup>48</sup> European Commission, ‘Strengthening the Rule of Law within the European Union: A Blueprint for Action. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions’, COM(2019) 343 final, p. 9.



illustrating what is going on: there are—quite obviously, and the Commission knows this very well—Member States which deviate from the Rule of Law as a matter of a calculated policy choice, thus not at all by mistake.<sup>49</sup> Rule of Law violations are not all the same and this basic point, which the Commission fails to make run like a red thread through the Communication, is absolutely crucial. The Member States that took a political choice, which is not formally available in the EU's constitutional landscape, to oppose the values of Article 2 TEU are the most important problem, not the ones which are unknowingly non-compliant and negligent.<sup>50</sup> Solving this problem through dialogue and cooperation is impossible, since dialogue and cooperation cannot be an answer to a calculated choice not to comply with the core principles, thus abusing the vulnerabilities of the enforcement tools available in the context of the EU legal system, while freeriding on the principle of mutual trust and reaping the economic benefits of the internal market. The situation of Hungary and Poland today is thus radically different from that of the Member States with troubled institutional structures, such as Greece,<sup>51</sup> Member States with particular electoral outcomes,<sup>52</sup> or Member States in principled disagreement with the EU on the functioning of some principles, as was the case with Germany and its courts, pushing through the change in the EU's approach to the idea of human rights protection.<sup>53</sup>

Yet—and quite astonishingly—it is by responding to the sleepwalking problem—which is *not* the cause of the Rule of Law crisis in the EU—in the context of this 'benevolent Member State paradigm'—which is a flawed representation of the nature of the Member States experiencing constitutional capture—that the Commission made its core proposal. The Commission will institute the 'Rule of Law Review Cycle'—a general annual process concerning all the Member States and boasting a very broad scope covering core elements of reform as well as the day-to-day functioning of all the branches of power in any field of competence. This will include law-making, effective judicial protection, the independence and impartiality of the courts, the separation of powers, and also the capacity of Member States to fight corruption, as well as media pluralism and elections. Accompanied by a network of experts in the field of the Rule of Law, the regular exercise will thus establish communication channels between the Member States on this issue, including the Member States which decided to turn one-party and not to abide by the basic principles of Article 2 TEU, thereby denying their citizens, and all the other EU citizens choosing to settle there, access to democracy and the Rule of Law emerging as neo-Soviet entities minus ideology, read entirely unsophisticated in their assault on our basic values.

<sup>49</sup> Jakab and Kochenov (2017b).

<sup>50</sup> Kochenov (2017a).

<sup>51</sup> Ioannidis (2017).

<sup>52</sup> Which was at the core of the FPÖ crisis in Austria leading, *inter alia*, also to a reform of Article 7 TEU: Lachmayer (2017); Toggenburg (2001). On Art. 7 TEU in this context see, Sadurski (2010).

<sup>53</sup> Mayer (2017).

Any seasoned observer of pre-accession window-dressing exercises becomes instantly worried<sup>54</sup>: what the Commission seemingly proposes in essence amounts to the repetition of the pre-accession country reporting in the areas of democracy and the Rule of Law as well as other principles assessed in the context of the Copenhagen political criteria,<sup>55</sup> but with one crucial difference: to apply this to the actual Member States. The outcome of the pre-accession process, which has been reported as a huge success, is, precisely, the Rule of Law crises in Poland and Hungary as well as a most wobbly situation with the Rule of Law in a handful of other Member States.

Granted: past failures—even if reported as successes—should not necessarily discourage us from being optimistic about the future. There are two more problems with the regular assessment proposed by the Commission, however. Firstly, it threatens to significantly alter the nature of EU federalism<sup>56</sup>: for the Commission to mingle with the essential features of the Member States outside the scope of fundamentally exceptional cases—such as Hungary and Poland today—has the potential to open the Pandora's box of the re-articulation of the limits of EU action. The outcome could be ongoing violations in the powerful Member States coupled with the increased bullying of the smallest Member States, which would have little say in the face of the Commission's pressure in a situation where the law is merely 'soft' and, consequently, the strictness of the basic rules regarding the division of powers between the EU and the Member States becomes more and more lax.<sup>57</sup> Even worse, secondly, the regular reporting is premised on the Member States' benevolence and their willingness to comply. Given that the starting paradigm mistakenly embraced by the Commission is entirely false, as demonstrated above, the outcomes of what the Commission proposed—in the form it proposed it—are highly unlikely to bring about a positive change to the EU's Rule of Law landscape, let alone solve the core Rule of Law problems on which the Commission's Communication remains silent. What they can do, however, is endanger the fragile balance of powers between the EU and the Member States in a situation where outright exceptional cases, which are absolutely clear, are not referred to by name. A false paradigm cannot be placed at the core of the crucial roadmap to solve the outstanding problems, however ill-identified.

How does the Commission intend to deploy its reporting? In the context of its Rule of Law Communication the Commission underlined the role of the Fundamental Rights Agency, which developed the EU Fundamental Rights Information System (EFRIS)—a comprehensive database that is relevant for rule of law discussion. Furthermore, a network of national contact points in the Member States will be set up for dialogue on rule of law issues. The Rule of Law Review Cycle will result in the Commission's annual Rule of Law Report, based partially on existing instruments such as the Justice Scoreboard and the European Semester. In light of the

<sup>54</sup> De Ridder and Kochenov (2011).

<sup>55</sup> Janse (2019); Hillion (2004); Kochenov (2004); Maresceau (2001).

<sup>56</sup> For a delightful introduction, see the irreplaceable Schütze (2009); cf. Kochenov (2017b).

<sup>57</sup> Ștefan (2013, 2017).

Communication, the annual report shall be a starting point for debates on Rule of Law issues conducted by the European Parliament and the Council. Grimheden and Toggenburg have long advocated the deeper involvement of the FRA in the management of the Rule of Law crises and it is great that the Commission is starting to take the Agency seriously in the Rule of Law context.<sup>58</sup> The Commission equally proposes to have a broad array of stakeholders involved in this reporting exercise, thus, again, borrowing from the pre-accession, where everyone was heard but this did not improve the wanting quality of the Commission's reporting resulting, to great degree, in the Rule of Law crisis that the EU is facing at the moment.<sup>59</sup> What is new and welcome in the Commission's Communication is a direct reference to the responsibility of the European political parties for their national counterparts respecting the necessary values up to the potential responsibility in terms of funding that they receive within the framework of Regulation 1141/2014.<sup>60</sup> Making the EPPs pay for the appeasing of the destruction of the Rule of Law in Hungary<sup>61</sup> is definitely an appealing idea, which is long overdue, but referring to the law in force proposes nothing new, of course. *Using* the law would be new—and here the questions are for the Commission as the guardian of the Treaties as to why it has been ignored so far.

All of the above does not change, however, the core question that arises: given that the Member States are not all benevolent and that the previous reporting as conducted by the Commission in the context of pre-accession failed to provide a reliable assessment of the entrenchment of the values of Article 2 TEU in what are now new EU Member States, thus effectively leaving us with the problem, what is the added value of the new reporting exercise that the Commission has proposed? The question is particularly acute given that the Commission's analysis is mute on the problem of constitutional capture and would thus assess Hungary next to Finland and Ireland, which is wasteful and unhelpful in the context of refusing to see what the core of the current problems is. To state that we are short of information on the Rule of Law in the Member States would be unfair and framing this as an important part of the problem—which the Commission does—only distracts from addressing the actual problems at hand. When the problem is the constitutional capture in Hungary and Poland, how much does one need to read about Ireland and Belgium in order to start dealing with the outstanding issues, which the Commission's Communication does not even explicitly name? The failure to outline the core Rule of Law problems plaguing the Union undermines the Communication's vision of the key tools and strategies of 'prevention', which is not surprising: there can be no 'prevention' without clarity as to what you are trying to prevent and the Commission somehow plays as if this was not the case.

<sup>58</sup> Toggenburg and Grimheden (2016).

<sup>59</sup> Kochenov (2008).

<sup>60</sup> Regulation (EU, Euratom) No. 1141/2014 of the European Parliament and of the Council of 22 October 2014 on the statute and funding of European political parties and European political foundations [2014] OJ L317/1.

<sup>61</sup> Kelemen (2017).

### 1.3 Enforcement

The *enforcement* aspect of the Rule of Law in the Commission's Communication clearly underlines the role of the Court of Justice, on the one hand, and the money that the problematic state receives, on the other. The Commission expresses its commitment to 'bring to the Court of Justice rule of law problems affecting the application of EU law, when these problems could not be solved through the national checks and balances'.<sup>62</sup> Let us not forget that this is—and has always been—the Commission's duty as the guardian of the Treaties and that its timid fulfilment of these duties coupled with the failure to see the full picture—like in the *Commission v. Hungary* cases,<sup>63</sup> has unquestionably contributed to the aggravation of the Rule of Law crisis in the European constitutional space. It is great that the Court has taken the lead and that the Commission acknowledges this and seemingly stands ready to start learning from its mistakes.<sup>64</sup> The problem, however, is that the Commission could be expected to be just as active as the Court from day one when the troubles with the constitutional capture started and this has not been the case, lending many years of largely untroubled existence to the backsliding governments busy dismantling the Rule of Law. The consolidation of their position under the Commission's careless watch is an unquestionable fact: the Commission helped the Orbáns of this world to buy time and it was not even expensive. Now that it is probably too late in the context of at least two Member States the Commission finally promises the curious citizens to 'pursue a strategic approach to infringement proceedings related to the rule of law'<sup>65</sup> supplemented with requests for expedited proceedings and interim measures. It is splendid to hear that the Commission plans to do its job—one would normally need no special Communication to be reassured of this, however.

All in all, the triad of enforcement outlined by the Commission essentially remains unchanged and includes its Rule of Law Framework; the infringement proceedings; and Article 7. It is most regrettable that the Commission provides no critical assessment of the practices of the Rule of Law Framework or Article 7 procedure, both boasting zero results up to now—and for very sound reasons. While the Commission awoke to the time-sensitive nature of the infringements of the values,<sup>66</sup> not a single word in the Communication explains why the deeply problematic Rule

<sup>62</sup> European Commission, 'Strengthening the Rule of Law within the European Union: A Blueprint for Action. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions', COM(2019) 343 final, p. 4.

<sup>63</sup> Compare Case C-286/12 *Commission v Hungary* [2012] ECLI:EU:C:2012:687 (compulsory retirement of judges) with Case C-619/18 R *Commission v Poland* Order ex parte of 19 Oct. 2018 EU:C:2018:852 and Order of 17 Dec. 2018, EU:C:2018:1021.

<sup>64</sup> This is what Kim Scheppele, *inter alia*, has been advocating for years: e.g. Scheppele (2016).

<sup>65</sup> European Commission, 'Strengthening the Rule of Law within the European Union: A Blueprint for Action. Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions', COM(2019) 343 final, p. 14.

<sup>66</sup> Cf. Schmidt and Bogdanowicz (2018). Cf. Śledzińska-Simon and Bárd (2019), Gormley (2017).

of Law Framework, which bought the backsliding governments so much time thanks to the Commission's own initiative, is still part of the tool-box.

The core added value of the 'enforcement' part seems to lie in the promise of the Commission to start taking its responsibilities rooted in the Treaties seriously and, which is also very important, in connecting Rule of Law problems openly to fraud and an adverse impact on the EU budget. The Communication contains direct references to the Commission Anti-Fraud Strategy (CAFS) and advocates the broader involvement of the European Anti-Fraud Office (OLAF) and cooperation with the European Public Prosecutor's Office (EPPO) in the context of the fight for the Rule of Law. The proposed Regulation on the Protection of EU budget in the case of generalised Rule of Law deficiencies remains high on the agenda and this can only be applauded.

## 2 The Elephants in the Room

The Commission admitted that part of the challenges that the Rule of Law is now facing is an outcome of deliberate policy choices. It does not seem that the Communication has provided any new approach to such 'hard cases', however, besides promising that the Commission will try to do its job. Most importantly, the literature on Rule of Law backsliding—in radical contrast with the Commission's Communication—clearly advocates one essential point: it is necessary to be crystal clear on the nature of the problem at hand and to act accordingly. Once constitutional capture and systemic backsliding in the Member States where opposition to the Rule of Law is a *systemic political choice* has been clearly outlined as the core problem, this is bound to alter the remedies required to deal with it. Having piled up a number of recommendations for itself and others, the Commission absolutely failed to clarify this crucially important matter: 'what is the essence of the EU's Rule of Law problem?' thus remains a burning question that has not been answered by the Commission in its Rule of Law Communication. Indeed, while seemingly armed with what Dixon, drawing on Krygier's work, called an 'anatomical understanding', the teleology of the Rule of Law has escaped the Commission entirely.<sup>67</sup> Failing to answer the 'what is the problem?' question clearly undermines the clarity of the Commission's view of the remedies proposed. This fundamental mistake could very easily be avoided. Inspired by the need for more dialogue with the likes of Hungary and Poland and advocating the view that nobody is perfect, the Communication is thus obviously not the most effective roadmap—with respect—to deal with constitutional capture, which is *the only* Rule of Law problem hollowing EU's Article 2 TEU promises and worthy of urgent attention. Even the flood of literature on the topic in the context of what Ronald Janse called the ongoing 'renaissance van de Rechtsstaat' apparently had little effect on the Commission.<sup>68</sup> In the Rule of Law Communication, however

<sup>67</sup> Dixon (2019).

<sup>68</sup> Janse (2018).

welcome, it is the Rule of Law, precisely, that remained, most regrettably, the elephant in the room.

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